THE STATE OF NEW HAMPSHIRE

HILLSBOROUGH, SS. SUPERIOR COURT
NORTHERN DISTRICT

N0. 01-S-1141

STATE OF NEW HAMPSHIRE

V.

CINDY GRANT-CHASE

OPINION AND ORDER

LYNN, J.

The defendant Cindy Grant-Chase is charged in a one count indictment with criminal solicitation to commit murder. RSA 629:2, I; RSA ch. 630 (1996 and Supp. 2001). The charge arises out of the defendant's alleged efforts, while incarcerated at the New Hampshire State Prison for Women, to have a fellow inmate, Carol Carriola, arrange for someone to murder the wife of a New Hampshire probation/parole officer with whom the defendant had had an affair. Presently before the court is the defendant's motion to suppress a tape recording of a conversation between the defendant and Carriola which was recorded with Carriola's consent. I conclude that the recording was lawfully made and therefore deny the motion.

The pertinent facts are as follows. Sometime prior to May 15, 2001, Carriola wrote a letter to the New Hampshire Attorney General's Office, indicating that she had been approached by a fellow inmate at the Goffstown Women's Prison to "take out" some people, and that one of the targeted individuals was a New

Hampshire parole officer. In response to this letter, Investigator Anthony Fowler of the Attorney General's Office interviewed Carriola on May 15, 2001. Carriola stated that she had been approached by the defendant approximately four times during the past two weeks to kill Cheryl Ciccone, the wife of probation/parole officer Bruce Ciccone. Carriola indicated that she was incarcerated on a RICO charge and that the defendant assumed Carriola had connections to organized crime. The defendant gave Carriola written directions to Ciccone's house in Marlow, New Hampshire, as well as a description of his car and motorcycle, and advised Carriola that there were guns in the Ciccone household. The defendant told Carriola that she wanted someone from New Jersey to come to New Hampshire and do the killing. Carriola stated that at first the defendant indicated that she only wanted Cheryl Ciccone killed and that she would pay Carriola $5,000.00 for the killing. Later the defendant told Carriola that Bruce Ciccone was trying to put the blame for the plan to kill Cheryl entirely on her, when it actually was the idea of both the defendant and Bruce; as a result, the defendant now wanted both Bruce and Cheryl Ciccone killed. The defendant also indicated that she did not have $5,000.00 in cash, but was willing to put up a car and a boat as collateral. The defendant gave Carriola a deadline of May 24, 2001, to have the killings accomplished, indicating that if the deadline was not met the defendant would find someone else to do the job.

Following the above interview, Detective Russell Lamson of the New Hampshire State Police checked with the FBI concerning Carriola. He was informed that, "although Carriola has some credibility issues, she has successfully cooperated with law enforcement in the past."

Based on the above information, and with Carriola's consent to the procedure, Assistant Attorney General Constance Stratton found that there was reasonable suspicion to believe that evidence of the crime of "conspiracy/homicide" would be derived from the recording of in-person conversations between the defendant and Carriola. Pursuant to RSA 570-A:2, II(d) (2001), Stratton therefore authorized the state police to equip Carriola with a body wire and to record her ensuing conversation with the defendant regarding the killing of the Ciccones.

RSA chapter 570-A:2, I generally prohibits the interception and use of any telecommunication or oral communication without the consent of all parties to the communication. RSA 570-A:2, II creates an exception to this general prohibition for certain specific types of interceptions. As pertinent here, RSA 570-A:2, provides:

> II. It shall not be unlawful under this chapter for:
> . . .
> (d) An investigative or law enforcement officer in the ordinary course of the officer's duties pertaining to the conducting of investigations of . . . offenses enumerated in this chapter . . . to intercept a[n] . . . oral communication, when . . . one of the parties to the communication has given prior consent to such interception; provided, however, that no such interception shall be made unless the attorney general,

> the deputy attorney general, or an assistant attorney general designated by the attorney general determines that there exists a reasonable suspicion that evidence of criminal conduct will be derived from such interception.

The defendant advances two arguments in support of her motion to suppress. First she asserts that the facts as recited above do not establish reasonable suspicion to believe that the defendant conspired, that is agreed with Carriola, to commit homicide. Second, the defendant contends that the information provided by Carriola was not sufficiently credible or reliable to support the assistant attorney general's finding of reasonable suspicion.

Before addressing the merits of the defendant's contentions, I first consider two threshold arguments advanced by the State in opposition to the motion to suppress. Initially the State asserts that the intercepted conversation between Carriola and the defendant does not constitute an "oral communication" within the meaning of RSA 570-A, and therefore is not subject to the statute at all. RSA 570-A:1, II defines "oral communication" as "any oral communication uttered by a person exhibiting an expectation that such communication is not subject to interception under circumstances justifying such expectation." (Emphasis added.) Relying on cases such as Hoffa v. United States, 385 U.S. 293, 302 (1966), State v. Kilgus, 128 N.H. 577, 591-92 (1986) and State v. Valenzuela, 130 N.H. 175, 182-89 (1987), which hold that neither the federal nor the state constitution affords protection to "a wrongdoer's misplaced belief that a person to whom he voluntarily

confides his wrongdoing will not reveal it," and on the Supreme Court's further holding in United States v. White, 401 U.S. 745, 752 (1971), cited approvingly in Kilgus, 128 N.H. at 592, that there is no difference for constitutional purposes "between probable informers on the one hand and probable informers with transmitters on the other," the State contends that the defendant could have no reasonable expectation that her conversation with Carriola would not be recorded. Although this argument has some facial appeal given the definition of "oral communication" contained in the statute, to accept the argument would completely undermine the clear legislative purpose to prohibit the recording of conversations without the consent of all parties absent one of the exceptions listed in RSA 570-A:2, II.

The definition of "oral communication" in RSA 570-A:1, II must be read in conjunction with the definition of "intercept" found in RSA 570-A:1, III. RSA 570-A:1, III defines "intercept" to mean "the aural or other acquisition of, or the recording of, the contents of any telecommunication or oral communication through the use of any electronic, mechanical, or other device." (Emphasis added.) If the "misplaced trust" analysis of the constitutional cases cited above was applied under the statute to situations in which the conversation between the putative wrongdoer and the informant was to be recorded, it is apparent that such recordings would virtually always fall without the protection of RSA 570-A. The reason is that, by the

constitutional standard, the non-consenting party would rarely if ever have an objectively justifiable expectation that the other party was not betraying his trust by recording their conversation. To construe the statute in this fashion would effectively convert New Hampshire into a one-party consent state, in clear contravention of RSA 570-A:2, I's requirement that interceptions be prohibited "without the consent of all parties" except as otherwise specifically authorized under that chapter. Such a construction also would render completely superfluous the procedure for obtaining attorney general authorization contained in RSA 570-A:2, II(d) and (e). See Fischer v. Hooper, 143 N.H. 585, 590 (1999) (construing RSA 570-A:1, II to require "only that a person exhibit a reasonable expectation that her conversation will not be `subject to interception,' not that the conversation will not be conveyed to a third person"); State v. Lamontagne, 136 N.H. 575, 579 (1992) (distinguishing between aural acquisition of communication by the recipient of a telephone call and recording the conversation).

The State next argues that because the consent of one party is all that is constitutionally required to record a conversation, the legislature did not intend for the attorney general's determination of the existence of reasonable suspicion under RSA 570-A:2, II(d) to be subject to judicial review. Rather, the State asserts that judicial involvement under RSA 570-A:2, II(d) should be limited to determining that the attorney general

actually gave his approval for the interception; once the court determines that such approval was in fact obtained, the judicial task is at an end and evidence of the interception is not subject to suppression under RSA 570-A:6. The defendant contends that the supreme court considered and rejected the State's argument in State v. Conant, 139 N.H. 728 (1995). At my request, the parties furnished me with a copy of the briefs submitted to the supreme court in Conant. My reading of those briefs, and the Conant decision itself, persuade me that the issue of whether the attorney general's reasonable suspicion determination is subject to judicial review was never specifically raised by the parties in that case. Consequently, it is entirely possible that the Conant court's discussion of the reasonable suspicion issue was premised on the assumption, not challenged by the parties, that the legislature intended to grant the judiciary authority to review the merits of the attorney general's RSA 570-A:2, II(d) determination. Therefore, it is not at all clear that Conant precludes me from addressing the State's argument. Nonetheless, I find it unwise and unnecessary to reach this issue of arguable first impression where what is clear is that the attorney general's authorization was supported by reasonable suspicion in any event.

The defendant's first challenge to the finding of reasonable suspicion is premised on the apparently undisputed fact that Carriola never had any intention of actually proceeding with the

plan to kill the Ciccones. Rather, Carriola appears merely to have feigned interest in the plan, with the intention of reporting to the authorities (as she did) what she learned from the defendant. However, evidence of a genuine agreement on Carriola's part is not essential to the defendant's liability for the crime of conspiracy. Under RSA 629:3, I (1999), a person commits the crime of conspiracy if, "with a purpose that a crime defined by statute be committed, he agrees with one or more persons to commit or cause the commission of such crime, and an overt act is committed by one of the conspirators in furtherance of the conspiracy." Paragraph II of RSA 629:3, goes on to state, "For purposes of paragraph I, `one or more persons' includes, but is not limited to, persons who are immune from criminal liability by virtue of irresponsibility, incapacity or exemption." Like most of New Hampshire's criminal code, RSA 629:3 is based upon the version of conspiracy found in the Model Penal Code. The Model Penal Code departs from prior common law by abandoning the plurality doctrine in favor of the unilateral approach to conspiracy liability. Under the unilateral approach, "[g]uilt as a conspirator is measured by the situation as the actor [the defendant] views it; [she] must have the purpose of promoting or facilitating a criminal offense, and with that purpose must agree (or believe that [she] is agreeing) with another that they will engage in the criminal offense or in solicitation to commit it." American Law Institute, Model Penal Code 5.03, Explanatory Note

at 79 (1985) (emphasis added). Although the New Hampshire Supreme Court has not specifically addressed the issue of whether the unitary theory of conspiracy liability applies in this state, the majority of states follow this approach. See, e.g., Miller v. State, 955 P.2d 892, 896-98 (Wyo. 1998); State v. Null, 526 N.W.2d 220, 229 (Neb. 1995); Commonwealth v. Sego, 872 S.W.2d 441, 443 (Ky. 1994); State v. Conway, 472 A.2d 588, 602-03 (N.J. App. 1984). Moreover, the language used by the legislature in defining the crime ("A person is guilty of conspiracy" versus "If two or more persons conspire," as found in, e.g., 18 U.S.C. 371) as well as the legislature's inclusion of paragraph II within the statute strongly support the view that RSA 629:3 was intended to adopt the unitary theory of conspiracy liability.

The facts recited previously are more than sufficient to establish that the defendant believed she was entering into a conspiracy with Carriola (and others) to cause the murder of Cheryl and/or Bruce Ciccone; and her various meetings with Carriola to discuss the matter constitute overt acts in furtherance of the conspiracy.

Alternatively, the defendant asserts that the information provided by Carriola was not sufficiently credible or reliable to create reasonable suspicion. "Under RSA 570-A:2, II(d), reasonable suspicion exists when [there are] `specific and articulable facts which, taken together with rational inferences from those facts,' . . . lead the authorizing official to believe

`that evidence of criminal conduct will be derived from [an] interception.'" Conant, 139 N.H. at 730. Whether reasonable suspicion exists in a given case is determined by examining the totality of the circumstances. Among the factors to be considered are the veracity, basis of knowledge, and other indicia of reliability of the person furnishing the information at issue. Id.

In contrast to Conant, see id. at 731-32, here there is no question as to Carriola's basis of knowledge. Carriola specifically recited the circumstances which led to her being approached by the defendant: viz., the defendant believed Carriola had organized crime connections and thus would be a fruitful source for locating a "hit man." Moreover, as in Conant, Carriola's information was based on firsthand knowledge which she gained from her direct conversations with the defendant over a period of approximately two weeks. Id. at 732. In addition, Carriola provided a detailed account of her discussions with the defendant. Id. at 731 ("an explicit and detailed description of alleged wrongdoing is entitled to greater weight than a general assertion of criminal activity").

As for Carriola's veracity, it is true that the FBI reported she had some "credibility issues." But this does not mean that the State was required to eschew the information she provided, see id. (informant found sufficiently reliable despite the fact that he initially gave "false names" to the police), particularly where

the FBI also reported that Carriola had successfully cooperated with law enforcement authorities in the past. Id. at 730 ("veracity or credibility may be inferred if the informant has `an established track record with the police'"). More importantly, by agreeing to meet with the defendant while wearing a recording device, Carriola showed that she was prepared to demonstrate her reliability. Id. at 731; see State v. Christy, 138 N.H. 357-58 (1994). Finally, although Carriola was incarcerated and therefore would arguably have a reason to curry favor with the authorities in hopes of some type of favorable consideration, there is no indication that she ever sought any sort of quid pro quo in return for her cooperation. Nor is there any evidence that Carriola had some pre-existing animosity toward the defendant which might have led her to seek private vengeance.

In sum, I conclude that the authorization for the consensual recording of the conversation between the defendant and Carriola was supported by a reasonable suspicion that the defendant was complicit in a conspiracy to cause a homicide and that the interception would produce evidence of this criminal conduct. Accordingly, the defendant's motion to suppress is hereby denied.

BY THE COURT:

February 24, 2002

ROBERT J. LYNN
Associate Justice